UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MAINE PEOPLE'S ALLIANCE and NATURAL RESOURCES DEFENSE COUNCIL, INC.,	)	
Plaintiffs	)	
v.	)	**CIVIL NO. 00-69-B-C**
HOLTRACHEM MANUFACTURING COMPANY, LLC, and MALLINCKRODT, INC.,	)	
Defendants	)	

RECOMMENDED DECISION

Defendant Mallinckrodt, Inc., has moved pursuant to Rule 6(b) to enlarge the time period for filing amendments to the pleadings and pursuant to Rule 15(a) to amend its answer to add the following defense:

> The provisions of Section 7002(a) of RCRA, 42 U.S.C. § 6972, as applied to the facts of this case, violate the United States Constitution, including Article 1 and the Fifth and Fourteenth Amendments thereto. Section 7002(a) was amended in 1984 to apply to past conduct involving solid and hazardous wastes and imposes joint and several liability. Mallinckrodt's ownership and operation of the Orrington plant was limited to the period 1967 to 1982. Mallinckrodt ceased any and all waste handling activities at the site when it was sold to Hamlin Group, Inc. in April, 1982, and many other parties have contributed to the mercury found in the Penobscot River.

(Motion to Amend Scheduling Order, Docket No. 23; Motion to Amend Answer, Docket No. 24.) Contrary to Mallinckrodt's representations regarding the viability of this defense, I am persuaded that it is futile. Additionally, I believe that permitting the amendment at this juncture

would unduly delay the case and prejudice the plaintiffs. For these reasons, I recommend that the Court **DENY** both motions.

APPLICABLE STANDARDS

Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). Pursuant to Rule 6(b), a party seeking enlargement of a filing deadline must demonstrate excusable neglect when the enlargement motion is filed after the deadline in question. Fed. R. Civ. P. 6(b).

DISCUSSION

Mallinckrodt contends, "The viability of the defense came to the attention of defense counsel upon learning that the same defense was met with tentative approval by the court at a pretrial conference in the matter of U.S. v. Asarco, by the U.S. District Court for the District of Idaho . . . ." (Docket No. 24 at 3-4.) Although the "viability" of the defense may have come to defense counsel's attention only recently, there is nothing novel about it. The basis for it is Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), in which a plurality of Supreme Court Justices concluded that a statutory provision within the Coal Act, 26 U.S.C. § 9706(a)(3), as applied, ran afoul of the Fifth Amendment Takings Clause. Id. at 529 (Kennedy, J., concurring; Stevens, J., and Breyer, J., dissenting). It is generally agreed that Eastern Enterprises has no precedential value and that its holding is limited to its rather unique facts and the narrow statutory subsection at issue. Thus, as discussed in more detail, *infra*, Eastern Enterprises, does

nothing to compromise generally recognized law that federal statutes imposing retroactive liability on commercial entities to remediate harms created by those entities do not violate the Fifth Amendment. For this reason, I conclude that the proposed amendment is futile. I also conclude that whatever the District Court for the District of Idaho may have stated by way of a pretrial remark indicating it would defer consideration of the same issue in litigation before it, that remark does not provide a basis to allow defendant's late filing of the proposed amendment.

1. Futility

Much of the existing case law addressing the constitutionality of the retroactive application of federal environmental laws involves CERCLA. These authorities support retroactive application of CERCLA on the grounds that Congress clearly indicated its intent that the Act be applied retroactively and that the Act permissibly allocates the burdens of environmental remediation to the parties who created the need for it. O'Neil v. Picillo, 883 F.2d 176, 183 n.12 (1st Cir. 1989) (approving retroactive liability under CERCLA over due process challenge and relying on United States v. Northeastern Pharm. & Chem. Co., Inc., *infra*); United States v. Northeastern Pharm. & Chem. Co., Inc., 810 F.2d 726, 732-34 (8th Cir. 1986) (affirming District Court's conclusion that retroactive application of CERCLA to acts of disposal made before CERCLA's effective date does not violate due process or give rise to a taking of property); O'Neil v. Picillo, 682 F. Supp. 706, 729 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989) (holding, without discussion, "that liability for response costs under CERCLA for releases which occurred prior to [December 10,] 1980 [(CERCLA's effective date)] does not offend due process"); United States v. Ottati Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1986) (holding, without discussion, that retroactive application of CERCLA does not offend due process); United States v. Shell Oil Co., 605 F. Supp. 1064, 1072 (D. Colo. 1985) ("[CERCLA] is by its very nature

backward looking. Many of the human acts that have caused the pollution already had taken place before its enactment; physical and chemical processes are at their pernicious work, carrying destructive forces into the future."); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 998 (D.S.C. 1984) (finding retroactivity of CERCLA to have a rational relationship to a valid congressional purpose because "Congress intended through CERCLA to create a broad remedial statute which allocates to those persons responsible for creating dangerous conditions, and who profited from such activities, the true costs of their enterprise").

Of course, this suit concerns RCRA rather than CERCLA. The First Circuit has not addressed the issue of whether RCRA liability, particularly pursuant to 42 U.S.C. § 6972(a)(1)(B), is retroactive and, if so, whether it should be treated any differently than CERCLA. Nevertheless, I do not see any principled basis for distinguishing the two acts on the issue of retroactive application. First, section 6972(a)(1)(B) clearly and unambiguously indicates a legislative intent to impose liability retroactively, thereby overcoming the presumption against retroactivity. See 42 U.S.C. § 6972(a)(1)(B) (authorizing actions "against any person . . . including any past or present generator . . . or past or present owner or operator . . . who has contributed or who is contributing to the past or present handling, storage, . . . or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment"). Second, to the extent such liability is imposed, it is clearly rationally related to a legitimate government interest. Supreme Court precedents make it "clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976)

(holding that the imposition of liability on coal mine operators "for the effects of disabilities bred in the past" (black lung disease) "is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor."). Like CERCLA, the imposition of liability pursuant to RCRA requires that the liable party have actually contributed to the harm at issue.[1] For this reason, I believe that Mallinckrodt's proposed defense is futile.

Mallinckrodt contends that Eastern Enterprises changes the legal landscape. In Eastern Enterprises, four Justices of the Supreme Court held that a decision by the Commissioner of Social Security to impose a substantial monetary obligation on Eastern, pursuant to 26 U.S.C. § 9706(a)(3), to ensure lifetime health benefits for former Eastern employees, constituted a regulatory taking because Eastern was not responsible for creating an expectation in its former employees, on which they might have relied, that they would receive lifetime health benefits. Eastern Enters., 524 U.S. at 514-516, 528-32. In his concurrence, Justice Kennedy agreed with the plurality's finding of a constitutional violation because of the glaring disjunct between the obligation imposed and Eastern's conduct. Id. at 549-50. However, Justice Kennedy disagreed with the plurality's decision to analyze the issue as a taking rather than as a substantive due process issue. Id. at 563. For their part, the four-justice dissent considered the Act to pass constitutional muster. They also agreed with Justice Kennedy that the case did not involve a taking and must be analyzed under a due process standard. Id. at 554. In other words, although a plurality succeeded in declaring the Act unconstitutional as applied, they did so by applying a standard that five of the Justices considered inapposite.

[1] For a good discussion of the various ways courts have addressed the retroactivity of RCRA, including whether it is, technically, a retroactive statute, see United States v. Conservation Chemical Co., 619 F. Supp. 162, 217-221 (W.D. Mo. 1985).

Several courts have described Eastern Enterprises as having no legal significance on existing law approving the retroactive application of remedial statutes such as CERCLA. See, e.g., Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534, 552 (6th Cir. 2001) (concluding that Eastern Enterprises "has no precedential effect" on the constitutionality of retroactive application of CERCLA "because no single rationale was agreed upon by the Court"); Combined Props. v. Morrow, 58 F. Supp. 2d 675, 681 (E.D. Va. 1999) ("Eastern Enterprises does not undercut the constitutionality of retroactive liability under CERCLA."). The distinction between predominantly "remedial" statutes, such as CERCLA, RCRA, and the Black Lung Benefits Act (the subject of Turner Elkhorn), and what are predominantly "oversight" statutes (for want of a better term), such as the Multiemployer Pension Plan Amendments Act and portions of the Coal Act, with respect to the Fifth Amendment concern for retroactive legislation, is clearly adverted to in the Eastern Enterprises plurality opinion:

> Eastern's liability also differs from coal operators' responsibility for benefits under the Black Lung Benefits Act of 1972. That legislation merely imposed "liability for the effects of disabilities bred in the past [that] is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." Turner Elkhorn, 428 U.S. at 18. Likewise, Eastern might be responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of employment, but there is no such connection here. . . .
>
> [T]he nature of the governmental action in this case is quite unusual. That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and *unrelated to any* commitment that the employers made or to any *injury they caused*, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised.

Eastern Enters., 524 U.S. at 536-37 (emphasis added). This distinction is reiterated in Justice Kennedy's concurrence.

> While we have upheld the imposition of liability on former employers based on past employment relationships, the statutes at issue were remedial, designed to impose an "actual, measurable cost of [the employer's] business" which the employer had been able to avoid in the past. . . . The Coal Act, however, does not serve this purpose. Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy.

Id. at 549-50 (quoting Turner Elkhorn, 428 U.S. at 19) (Kennedy, J., concurring). In sum, the plurality and Justice Kennedy concurred only that the Coal Act was unconstitutional as applied because it imposed a substantial monetary obligation on Eastern Enterprises that was unreasonable and unfair given the absence of any conduct on Eastern Enterprises's part to generate the entitlement at issue. The instant RCRA citizens' suit, concerned as it is with Mallinckrodt's alleged exportation of the costs and harms associated with a by-product of its past commercial operations, directly relates to the question of who will bear the clean-up burdens[2] associated with past economic activity conducted by Mallinckrodt, among others. Cf. Combined Props., 58 F. Supp. 2d at 681 ("If [the defendant] is found liable under CERCLA, it will be as a result of its own conduct in disposing of the toxic chemical PCE . . . because, unlike Eastern, [the defendant] is alleged to have played a role in creating the very harm that the statute at issue is designed to remedy.") For this reason, even if Eastern Enterprises had precedential significance,

[2] The fact that this suit seeks injunctive relief highlights the primary critique leveled by Justice Kennedy and the four Justices in dissent. These five Justices refused to view Eastern Enterprises as a regulatory takings case precisely because it concerned only an administrative order to pay money, not a taking of a specific interest in physical or intellectual property or an identifiable "fund" of money. Eastern Enters., 524 U.S. at 542-43, 554-555. Because this suit seeks an order requiring the defendants to conduct costly studies and remediation, not to surrender a sum certain as in Eastern Enterprises, the inapplicability of the plurality opinion is even more apparent.

it would not be on point. Because it is not on point, it cannot serve to call settled law into question.

2. Undue prejudice and delay

With respect to the prejudice imposed on the plaintiffs, Mallinckrodt contends that the existing defenses require the same discovery as the proposed additional defense. However, it seems clear that the proposed defense would require additional discovery. Specifically, the "ad hoc and fact intensive" takings standard (which the Eastern Enterprises plurality based its decision on) includes three key inquiries: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." Eastern Enters., 524 U.S. at 523-24 (quoting Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-25 (1986)). The second factor, in particular, would introduce a new and burdensome area for discovery that is not currently raised by Mallinckrodt's defenses or otherwise relevant to the claim. This amendment would undoubtedly require significant additional trial time as well, in order for Mallinckrodt to make a showing of its investment-backed expectations and for the plaintiffs to rebut the same. Given the lateness of the motion, I believe that the additional discovery and trial burdens would unduly delay this action and unduly prejudice the plaintiffs. Moreover, given that five Justices of the Supreme Court would not consider application of the Takings Clause to be appropriate, the burdens that would flow from the proposed amendment would be quixotic at best.

3. Motion to Amend the Scheduling Order

Mallinckrodt complains that the amendment deadline should be enlarged because it unfairly gave the plaintiffs the better part of a year to amend their complaint, but only gave

Mallinckrodt less than two weeks to amend its answer. The initial scheduling order indicated a deadline for amendment of 30 days following resolution of the motions to dismiss, which would have expired in early February 2001. The instant motion was filed on March 29, 2001, two months after the initial answer was filed and a little more than a month after the deadline for amendments had passed. I do not think it unfair that Mallinckrodt had less time to seek amendments than the plaintiffs because Mallinckrodt's answer was filed so close to the amendments deadline. In my view, regardless of when the answer was filed, the two-month period taken to research the motion to dismiss, coupled with the one-month period in which the response and reply where prepared and filed and the five-month period in which this Court assessed its merits, afforded both parties ample time in which to identify all available claims and defenses. In this light, Mallinckrodt's excuse for the failure to timely amend is not satisfactory.

CONCLUSION

The proposed amendment would be futile in light of the existing state of the law regarding retroactive application of remedial statutes of this nature. A denial of the motion to amend will not prevent Mallinckrodt from challenging the merits of the plaintiffs' suit. By the same token, denial of the motion will prevent the unwarranted expenditure of additional time and money. Even if the proposed defense had merit, Mallinckrodt has failed to meet a generous amendment deadline and has failed to present a valid excuse for this failure. Moreover, allowance of the amendment would unduly delay the litigation and burden the plaintiffs. Accordingly, I recommend that the Court **DENY** both the motion to amend the answer and the motion to amend the scheduling order.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten days of being served with a copy thereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated May 29, 2001

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Margaret J. Kravchuk
U.S. Magistrate Judge

COMPLX

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-69

MAINE PEOPLE'S ALLIA, et al v. HOLTRACHEM MFG CO, et al Filed: 04/10/00

Assigned to: JUDGE GENE CARTER

Demand: $0,000 Nature of Suit: 893

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:6901 Resource & Recovery Act

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